Leggett & Platt, Inc. and International Association of Machinists *and* Aerospace Workers (IAM), AFL–CIO. Cases 09–CA–194057, 09–CA–196426, and 09–CA–196608

December 9, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On December 17, 2018, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding, among other things, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union at a time when the Respondent no longer had objective proof that the Union actually had lost majority support, as required under *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001).[1] The case is now before the Board again pursuant to a court remand to consider a relevant change in Board precedent that occurred after the decision issued.[2] For the reasons given below, we have decided to affirm our earlier decision.[3]

I.

This is a so-called "anticipatory" withdrawal case in which the Respondent, during the term of the parties' collective-bargaining agreement, received an employee petition appearing to establish that a majority of bargaining-unit employees no longer wanted the Union to represent them.[4] Based on that petition, the Respondent announced to the Union that it would withdraw recognition upon the expiration of the agreement, and it did so.[5] Between the Respondent's announcement and its actual withdrawal of recognition, however, the Union had gathered a sufficient number of signatures from employees expressing their desire to retain union representation – some from employees who previously had signed the prior antiunion petition—to negate the loss-of-majority status indicated by the latter petition. As a result, the Respondent's withdrawal of recognition occurred at a time when it could no longer establish that the Union had lost majority support. Consequently, the Board found that the withdrawal was unlawful under then-prevailing Board law.[6] To remedy this violation, the Board issued an affirmative bargaining order, which effectively required the Respondent to recognize and bargain with the Union for a reasonable period of time without challenge to its majority status.

The Respondent filed a petition for review of the Board's Decision and Order in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement. While the matter was pending before the D.C. Circuit, on July 3, 2019, the Board issued its decision in *Johnson Controls*, *Inc.*, 368 NLRB No. 20, which also concerned an "anticipatory" withdrawal of recognition where the union had reacquired majority status between the employer's announcement that it would withdraw recognition upon contract expiration and its subsequent implementation of the withdrawal. As in the present case, that sequence of events would have resulted in the Board finding the withdrawal unlawful under then-extant precedent. A majority of the Board, however, decided to overrule that precedent.[7] The majority held instead that if an employer receives proof that an incumbent union has actually lost majority support within 90 days prior to contract expiration, that evidence will conclusively rebut the union's presumptive continuing majority status when the contract expires, thus freeing the employer to withdraw recognition regardless of whether the union may have reacquired majority status in the interim. Under the new framework announced in *Johnson Controls*, the union may seek to reestablish its majority status by filing an election petition within 45 days of the employer's anticipatory with-

[1] See *Leggett & Platt, Inc.*, 367 NLRB No. 51.

[2] *Leggett & Platt, Inc. v. NLRB*, USCA Case # 19-1003, Document #1801041 (D.C. Cir. Aug. 7, 2019).

[3] Member Emanuel was and remains recused from this matter. Accordingly, he took no part in the Board's earlier decision, and he has not participated in this supplemental decision.

[4] The facts are set forth in full in the administrative law judge's decision.

[5] The Respondent was not permitted to withdraw recognition so long as the agreement remained in effect. See *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 786 (1996) ("[A] union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement up to 3 years.").

[6] See *Parkwood Developmental Center*, 347 NLRB 974, 975–976 (2006), enfd. 521 F.3d 404 (D.C. Cir. 2008); *HQM of Bayside, LLC*, 348 NLRB 758, 760–761 (2006), enfd. 518 F.3d 256 (4th Cir. 2008). The Board further affirmed the administrative law judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by subsequently making unilateral changes to 12 of the employees' terms and conditions of employment. The Board also adopted the judge's finding that the Respondent violated Sec. 8(a)(1) when a supervisor unlawfully provided aid to the decertification petition that was filed after the withdrawal of recognition. Finally, in the absence of exceptions, the Board adopted the judge's dismissal of an allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the job-bidding procedure.

[7] Chairman Ring and Members Kaplan and Emanuel formed the three-member majority in *Johnson Controls*. Member McFerran dissented.

drawal of recognition. Further, the majority decided to apply its new holding retroactively to "pending cases."

Thereafter, on July 29, 2019, the General Counsel filed a motion with the D.C. Circuit requesting that this case be remanded to the Board to determine the retroactive impact, if any, of *Johnson Controls* on this case. On August 7, the court granted the motion to remand.[8]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having reviewed the case on remand in light of *Johnson Controls*, has decided not to apply *Johnson Controls* retroactively here. Accordingly, we reaffirm the findings of our prior decision.

II.

Typically, when the Board overrules precedent in favor of a new policy or standard, as in *Johnson Controls*, it determines whether the new policy will be applied prospectively only or retroactively, based on the nature and effect of the change and other circumstances.[9] The Board's "'usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage,' unless retroactive application would work a 'manifest injustice.'" 368 NLRB No. 20, slip op. at 11 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)); see *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Board majority in *Johnson Controls* found that retroactive application of its new policy would not result in manifest injustice and followed its ordinary practice of giving the decision retroactive effect. 368 NLRB No. 20, slip op. at 11.

However, even when the Board states its intent to apply a new policy to "all pending cases in whatever stage," courts look to the Board for express guidance as to whether the retroactive effect encompasses cases previously decided by the Board and pending appeal.[10] *NLRB v. Food Store Employees*, 417 U.S. at 10. The Board in *Johnson Controls* did not expressly determine whether such cases should be reassessed under the new policy. In the particular circumstances of the present case, we find for institutional reasons and in order to best effectuate the purposes of the Act that the newly adopted policy should not apply here.

Having carefully considered the particular circumstances here, we have determined that retroactive effect in this case would seriously undermine the Board's expectation of prompt compliance with its bargaining orders. Although the filing of exceptions in *Johnson Controls* preceded those in this case by approximately 19 months, the Board decided this case first, relying on long-established existing law under *Levitz*.[11] Thus, in a decision issued over 6 months prior to the announcement of a new policy in *Johnson Controls*, the Board found, among other things, that the Respondent unlawfully withdrew recognition from the Union, refused to bargain, and implemented unilateral changes in terms and conditions of employment. The Board further found that an affirmative bargaining order was the appropriate remedy for the Respondent's withdrawal of recognition from the Union. 367 NLRB No. 51, slip op. at 1-2 (citing *Caterair International*, 322 NLRB 64, 68 (1996)).

Applying the Board's revised policy under *Johnson Controls* in this case would negate the Board's deliberate determination to the contrary. Moreover, as the affirmative bargaining order included in the remedy here had been in effect for over 6 months before the issuance of *Johnson Controls*, the parties should have been negotiating for, and perhaps could have reached, a new collective-bargaining agreement during the intervening period. Reversing the Board's final decision and bargaining order would not only disrupt the bargaining relationship of the parties to this case but also incentivize parties to delay compliance with bargaining orders in the hope or expectation of a change in the law. In view of these considerations, we decline to revisit this case under the *Johnson Controls* standard. See *Blackman-Uhler Chemical Division*, 239 NLRB 637 (1978) (declining to applying new legal standards to case after remand from the court of appeals, given existence of bargaining order). We emphasize that our decision in this regard is limited to the circumstances presented here, as explained above, and that it does not preclude retroactive application of

[8] The D.C. Circuit remanded the entire consolidated case to the Board.

[9] See *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 10 (1974) (finding that the Board should decide in the first instance whether to give a new policy retroactive application).

[10] See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958) (observing that there is no consistent rule for retroactive application of Board policies for cases pending before the circuit courts); *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1056 (11th Cir. 1983) (finding that retroactive application to all pending cases does not indicate whether the new policy announced in *Midland National Life Insurance Co.*, 263 NLRB 127(1982), should apply to cases pending before the courts); *NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, 498-499 (7th Cir. 1984) (finding that the same language indicated an intent to apply *Midland* to cases that were *not* before the courts when *Midland* was decided).

[11] Member Emanuel was recused and did not participate in the Board's decision. Chairman Ring and Member Kaplan agreed to apply extant law in the absence of a three-member majority to reexamine precedent, in accordance with longstanding Board practice. 367 NLRB No. 51, fns. 2, 4. See, e.g., *Williams Energy Services & Paper*, 340 NLRB 764, 765 fn. 6 (2003) (then-Member Liebman applying extant precedent in the absence of three votes to overrule it, "[f]or institutional reasons").

any other Board decision to cases pending in the courts of appeals involving different facts and legal issues.

For the foregoing reasons, we reaffirm the findings, conclusions, Order and notice from our prior decision in this case, including the previously issued affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition.

ORDER

The National Labor Relations Board affirms its previous Order and orders that the Respondent, Leggett & Platt, Inc., Winchester, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the order.

Dated, Washington, D.C. December 9, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD